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Supreme Court of the United States

DAVID JENNINGS, ET AL.,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF 43 SOCIAL SCIENCE RESEARCHERS AND PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 43 scholars and researchers in the fields of sociology, criminology, anthropology, psychology, geography, public health, medicine, Latin American studies, and law, whose work relates to incarceration and detention, migrant populations, and the effect of U.S. immigration detention and removal policies on migrant populations. A full list of *amici curiae*—who join this brief as individuals, not as representatives of any institutions with which they are affiliated—is set forth in the Appendix to this brief.

At issue in this case is whether the Ninth Circuit properly affirmed the permanent injunction requiring, *inter alia*, rigorous bond hearings for all class member immigrant detainees who have been detained by the government for longer than six months pursuant to one of the general immigration detention statutes (i.e., 8 U.S.C. §§ 1226(a), 1226(c), 1225(b)). The objective of the *amici curiae* in this brief is to provide the Court with an empirically grounded understanding of the scope of prolonged detention; the distinctive individual, familial, and societal harms it poses; and the relationship between individualized bond hearings and rates of absconding and recidivism. *Amici* are uniquely positioned to

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

address these issues, which are critical to an informed resolution of the questions presented.

INTRODUCTION

Social science can shed light on empirical questions about the U.S. immigration detention system that are crucial to resolving this case. *Amici* will address the following three questions:

1. Is immigration detention in fact short-term in the "vast majority of cases," as this Court concluded regarding mandatory detention in *Demore v. Kim*, 538 U.S. 510, 530 (2003)?

2. Are there distinctive individual, familial, and societal harms associated with prolonged immigration detention?

3. What does the contemporary research show regarding the relationship between the provision of immigration bond hearings and rates of absconding and recidivism?

When this Court considered mandatory immigration detention in *Demore v. Kim*, it relied on data that the government recently acknowledged was erroneous.[2] The Court also relied on research on absconding and recidivism that is now out of date. We offer this *amicus* brief to provide the Court with additional research and data on each of these ques-

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[2] *See* Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Hon. Scott S. Harris, Clerk, Supreme Court 1-3 (Aug. 26, 2016), *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491).

tions. This Court's decisions have frequently relied on such social science research. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015); *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012); *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 494 (1954).

In summary, the answers to the above questions are as follows:

1. While the overwhelming majority of immigrants detained pending removal proceedings are held for less than six months, prolonged detention[3] disproportionately affects a substantial minority of detainees with strong legal defenses to deportation, including strong asylum claims. These individuals have uniquely high success rates in removal proceedings. *See* Part I.

2. The practice of detaining immigrants longer than six months without an individualized bond hearing inflicts significant harms on detainees, their families, and society at large. *See* Parts II-IV. Prolonged detention exacerbates the physical, mental, societal, and economic harms of transitory detention, and presents unique harms and risks of its own. Immigrants held in prolonged detention suffer physically and psychologically from substandard medical and mental health care, isolation, and increased risk of physical and sexual assault. *See* Parts II.A-B. Detainees' financial and legal interests are

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[3] For purposes of this brief, "prolonged" detention and "long-term" detention are defined as detention lasting longer than six months. *Accord Rodriguez v. Robbins*, 804 F.3d 1060, 1065 (9th Cir. 2015).

also harmed as a result of long-term detention. *See* Parts II.C-D. Beyond these individualized harms, prolonged detention destabilizes families and communities. It also harms society, causing lasting harm to a generation of children impacted by their family members' prolonged detention and costing taxpayers millions of dollars. *See* Parts III-IV.

3. The contemporary research demonstrates that providing detainees with bond hearings does not undermine immigration enforcement. To the contrary, in FY 2015, 86% of individuals released from detention by an Immigration Judge showed up for their court hearing. *See* Part V.A. Additionally, as of May, 2014, ICE reported a recidivism rate of less than 3% for individuals with criminal records who were released from ICE custody in FY2013. *See* Part V.B. The data show that releasing immigrants under appropriate conditions of supervision—as required by the Ninth Circuit in this case—increases appearance rates and reduces recidivism even further. Immigrants released on bond who are subject to supervision return for their hearings 94-99% of the time, while less than 1% were subsequently arrested for alleged criminal activity. *See* Part V.

ARGUMENT

I. Prolonged Detention Is a Widespread Problem for a Limited Subset of Immigrants With Strong Defenses to Deportation.

Social science data reveals that detainees subject to prolonged detention are also the ones most likely

to prevail on their claims to remain in this country. In the case at hand, the record shows that class members were *five times* more likely to win their cases than the general detainee population—35% compared to 7%. J.A. 122, tbl. 35. This is consistent with recent empirical research, which shows that detainees who had legal representation had both the longest case durations and the greatest rate of success.[4] Represented detainees had an *average* case duration of 314 days and a 47% rate of relief.[5] The correlation between length of detention and meritorious defenses is particularly striking in two categories of detainees—those detained pursuant to §1226(c) and asylum seekers detained pursuant to §1225(b).

A. Prolonged Detention Impacts Immigrants Detained Pursuant to 8 U.S.C. §1226(c) With Strong Legal Defenses to Deportation.

In *Demore v. Kim*, the Court stated that "the detention at stake under §1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." 538 U.S. 510, 530 (2003). As previously noted, these numbers were, in fact, mistaken at the time.[6]

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[4] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 fig. 6 (2015).

[5] *Id.* at 65, Table 6.

[6] *See supra* note 2.

Now the Court has the benefit of additional data and research reflecting that, while most immigrants detained pursuant to §1226(c) do spend a brief amount of time in detention, for the significant number that pursue substantial defenses to deportation, the length of detention is markedly longer.

In August 2016, the government made public statistics on the duration of removal cases involving immigrants detained under §1226(c).[7] In FY2015, roughly 11,000 such removal cases were completed without an appeal to the Board of Immigration Appeals. Of these, 941 (8.5%) took over six months to resolve. There were an additional 1,220 cases in which an appeal was filed. Of these, 866 (71%) took more than six months for a decision to issue, and the *average* time from case initiation until the appeal decision was 313 days. Thus, while it is true that the majority of all respondents detained pursuant to §1226(c) have their removal cases resolved in under six months, the number of cases that take longer—in FY2015, 1,807—is significant.

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[7] Office of Planning, Analysis, & Statistics, Exec. Office for Immigration Review, *Certain Criminal Charge Completions Statistics* (2016), http://tinyurl.com/gngrzqt. The statistics do not, in fact, line up precisely with immigrants subject to mandatory detention under §1226(c). The government provides two sets of charts, with and without one specific charge of removability, §237(a)(2)(A)(i). This charge is complicated to classify because it encompasses both mandatory and discretionary detainees, depending on the length of the individual's criminal sentence. There is no data on the breakdown of this charge, but the resulting uncertainty is modest: for example, the 941 figure for cases with no appeal filed that took more than six months to resolve is an undercount by some fraction of 43 detainees.

The individuals subject to prolonged detention under §1226(c) were also the most likely to prevail in their removal proceedings. While class members in general were five times more likely to win their cases than the general detainee population, J.A. 122, tbl. 35, those detained pursuant to §1226(c) had even higher rates of success: 38% of this subclass obtained relief from deportation, as compared to 7% in the general detainee population. J.A. 122, tbl. 35; 135, tbl. 38; App. 34a.

B. Prolonged Detention Impacts Asylum Seekers Initially Detained Pursuant to 8 U.S.C. §1225(b), the Large Majority of Whom Win Their Asylum Claims.

The Court in *Demore* did not consider the population of immigrants who request asylum at the border, and therefore are originally detained pursuant to §1225(b). Only a small, but significant, minority of arriving noncitizens—namely, those who are detained for six months or longer pending removal proceedings—receive a bond hearing under the Ninth Circuit's ruling.

The large majority of noncitizens apprehended at or near the border are immediately removed from the country by an immigration officer through the expedited removal system, without ever seeing an Immigration Judge. In 2013, the most recent year for which data is publicly available, 193,032 individuals were processed through expedited removal.[8] This

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[8] John F. Simanski, U.S. Dep't of Homeland Sec., Annual Report: Immigration Enf't Actions: 2013 5 (Sept. 2014).

number represents 44% of total removals for the year and 82% of ICE removals at the border.[9]

At the border, only people who are not subject to expedited removal—that is, asylum seekers who pass the credible fear screening and individuals with facially valid documents who fail to establish their admissibility—are referred for removal proceedings.[10] In FY 2015, the government conducted over 11,000 credible fear screenings at ports of entry, of which roughly 9,000 asylum-seekers passed.[11] Of these, ICE has markedly increased the proportion who are detained, from 49% in 2010 to 84% in 2014.[12] Assuming the same proportions in FY2015, ICE detained approximately 7,500 asylum seekers who were arriving aliens, some of whom would remain detained for over six months.

A much greater number of asylum-seekers pass credible fear screening through the "inland" process,

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[9] U.S. Immigration and Customs Enf't, FY 2015 ICE Immigration Removals, http://tinyurl.com/hmynlsb (reporting 235,093 border removals in FY 2013, which are defined as individuals removed by ICE who are "apprehended by a CBP officer or agent while attempting to illicitly enter the United States at or between the ports of entry").

[10] 8 U.S.C. §§1225(b)(1)(A)(i)-(ii), (b)(2)(A).

[11] U.S. Citizenship and Immigration Servs., Credible Fear Workload Report Summary 3 (Sept. 2015), http://tinyurl.com/j5ne9wl.

[12] Human Rights First, *Lifeline on Lockdown: Increased U.S. Det. of Asylum Seekers* 11 & n.13 (July 2016). The government data on what subset of these asylum-seekers remain detained for more than six months has been difficult to obtain and analyze. *Id.*

meaning they are apprehended in the interior of the country, not at the border, and then receive a credible fear interview. In FY2015, the government conducted over 30,000 such "inland" credible fear screenings, and over 24,000 asylum-seekers passed.[13] It is uncontested that these individuals receive a bond hearing. *See Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).

If the statutes were read to foreclose individualized bond hearings for the subpopulation of arriving asylum seekers, the parole system would be their only means of seeking release from detention. The limited research available on the parole system for asylum-seekers depicts a system that is unpredictable and nontransparent. In 2012, ICE granted parole to 80% of arriving asylum seekers who passed their credible fear interview.[14] In 2015, ICE granted parole to only 47% of such persons—even though the criteria for release did not change.[15] Attorney reports that ICE denied parole despite ample evidence demonstrating a lack of flight risk or security risk heighten concerns about whether the parole guidelines are uniformly applied.[16]

Subjecting arriving asylum-seekers to prolonged detention warrants careful consideration for two reasons. First, as detailed in Part II.B, *infra*, asy-

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[13] U.S. Citizenship and Immigration Services, Credible Fear Workload Report Summary, *supra* note 11.

[14] *Lifeline on Lockdown*, *supra* note 12, at 13.

[15] *Id.*

[16] *Id.*

lum-seekers face particular harms from prolonged detention given their recent experiences of trauma in the countries from which they fled. Second, this subclass of detainees is particularly likely to prevail in contesting their deportation. Indeed, 97% of the subclass members in this case applied for asylum, and two-thirds obtained relief. J.A. 98, tbl. 28; J.A. 135, tbl. 38.

II. Prolonged Detention Causes Distinctive and Irreparable Harms to Detainees.

While detention for any length of time is detrimental, prolonged detention results in additional, distinctive harms that are particularly severe, and often irreparable. In particular, individuals subject to prolonged detention suffer four types of harms—physical, psychological, economic, and legal—that differ in degree and kind from those suffered by short-term detainees.

A. Physical Harms of Prolonged Detention.

Extended detention exacerbates a whole range of risks to the health and safety of immigrant detainees. Long-term detainees suffer from insufficient medical care, sexual assault, the excessive use of solitary confinement, and generally poor conditions that take an increasing toll the longer one remains in custody.

Insufficient Medical Care. Numerous studies and reports have documented insufficient medical care in immigration detention facilities. A 2009 government investigation led by Department of Home-

land Security ("DHS") Special Advisor Dr. Dora Schriro identified, among other concerns, systematic failures to provide adequate medical care in immigration detention facilities, and a wide disparity in the availability and quality of care between facilities.[17] In response to the Schriro Report, the government in 2009 announced an initiative to improve accountability and safety in detention facilities.[18]

In the seven years since this announcement, however, many of the problems highlighted by the Schriro Report continue.[19] From October 2003 through September 2016, ICE has acknowledged the death in custody of 163 detainees.[20] One review of the medical records of 18 detainees who died between 2012 and 2015 concluded that "substandard medical care and violations of applicable detention

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[17] Dora Schriro, U.S. Immigration & Customs Enf't, *Immigration Det. Overview and Recommendations* 25 (2009).

[18] *See* Press Release, U.S. Immigration & Customs Enf't, Sec'y Napolitano & ICE Assistant Sec'y Morton Announce New Immigration Det. Reform Initiatives (Oct. 6, 2009).

[19] *See, e.g.*, Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Det. Sys. – A Two-Year Review* 25 (2011); Detention Watch Network, *Expose and Close: One Year Later: The Absence of Accountability in Immigration Det.* (2013). *See also* Tanya Golash-Boza, *Immigration Nation: Raids, Dets., and Deportations in Post-9/11 America*, 8 Soc'ys Without Borders 313, 313 (2012); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Det.*, 45 Harv. C.R-C.L. L. Rev. 601, 602-03, 622 (2010).

[20] U.S. Immigration & Customs Enf't, *List of Deaths in ICE Custody*, http://tinyurl.com/jq2pzo9.

standards . . . probably contributed to the deaths of 7 of the 18 detainees."[21]

These conditions are unlikely to improve any time soon: a February 2016 Government Accountability Office (GAO) audit of ICE's management and oversight of immigration detention facility standards concluded that ICE still lacks adequate processes for tracking and addressing complaints of inadequate medical treatment.[22]

Increased Risk of Sexual Abuse and Assault. Prolonged detention also increases the risk of sexual abuse and assault. Incidents of sexual abuse in the detention system are well documented.[23] In 2009, the National Prison Rape Elimination Commission found that, "[a]s a group, immigration detainees are

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[21] Human Rights Watch, *US: Deaths in Immigration Det.* (July 7, 2016); *see also* ACLU, *Fatal Neglect: How ICE Ignores Deaths In Det.* 3 (2016) (concluding that "[i]n nearly half of the death reviews produced by ICE, the documentation suggests that failure to comply with ICE medical standards contributed to deaths"); Office of Det. Oversight, U.S. Dep't of Homeland Sec., Compliance Inspection of Adelanto Correctional Facility 2 (2012) (finding "egregious errors" by medical staff led to Dominguez Valdivia's death).

[22] U.S. Gov't Accountability Office, *GAO-16-231, Report to the Ranking Member, Committee on Homeland Sec., House of Representatives: Immigration Det.: Additional Actions Needed to Strengthen Mgmt. and Oversight of Detainee Medical Care* (Feb. 2016).

[23] *See, e.g.*, David Kaiser & Lovisa Stannow, *Immigrant Detainees: The New Sex Abuse Crisis*, NYR Daily (Nov. 23, 2011), http://tinyurl.com/zsabv4l; Human Rights Watch, *Detained and At Risk: Sexual Abuse and Harassment in United States Immigration Det.* (Aug. 25, 2010).

especially vulnerable to sexual abuse and its effects while detained due to social, cultural, and language isolation; poor understanding of U.S. culture and the subculture of U.S. prisons; and the often traumatic experiences they have endured in their culture of origin."[24] These risks are even more acute for certain especially vulnerable subpopulations, including transgendered detainees.[25]

In 2013, the GAO conducted a study on sexual abuse and sexual assault in immigration detention facilities and found that ICE did not maintain complete records regarding sexual abuse and assault incidents.[26] The report substantiated 15 incidents of sexual assault in ICE facilities from October 2009 through March 2013[27]—which is almost certainly a gross understatement of actual incidents given the lack of documentation. Exacerbating the failures of record-keeping, up to 40% of sexual abuse and as-

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[24] Nat'l Prison Rape Elimination Comm'n, *National Prison Rape Elimination Comm'n Report* 176 (2009) (citations omitted).

[25] Human Rights Watch, "*Do You See How Much I'm Suffering Here?": Abuse Against Transgender Women In US Immigration Det.* (Mar. 23, 2016) ("[T]hree out of fifteen substantiated incidents of sexual assault in US immigration detention facilities involved transgender women.").

[26] U.S. Gov't Accountability Office, *GAO-14-38, Immigration Det.: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse* 25 (2013).

[27] *Id.* at 60-62.

sault allegations were not reported to ICE headquarters as required by agency procedures.[28]

In 2014, nearly a decade after passage of the Prison Rape Elimination Act (PREA), DHS issued regulations implementing the Act's protections against sexual abuse in custody.[29] The regulations, however, do not automatically apply to facilities operated by local sheriffs or private contractors—which together house the vast majority of ICE detainees. The PREA regulations will not be enforced at these facilities until the underlying detention contracts are renegotiated.[30] As a result, it may be years before long-term detainees will be fully covered by the PREA regulations. Informal barriers to preventing and reporting sexual abuse in DHS facilities—such as retaliatory loss of privileges—may also allow abuse to continue to remain hidden.[31]

Frequent Misuse of Solitary Confinement. Another serious risk to the health and safety of long-term detainees is the improper use of solitary confinement, which ICE typically refers to as "segregation." In 2013, ICE released data showing that, on

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[28] *Id.* at 1, 19.

[29] Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100 (Mar. 7, 2014) (codified at 6 C.F.R. pt. 115).

[30] 79 Fed. Reg. at 13104 n.6.

[31] Erika Eichelberger, *Watchdog: Feds Are Muzzling Us for Reporting Alleged Immigrant Detainee Sex Abuse*, Mother Jones (Mar. 19, 2014, 10:02 AM), http://www.motherjones.com/politics/2014/03/ice-sexual-abuse-immigrant-detention-oversight.

average, 300 immigrants are held in solitary confinement at the 50 largest detention facilities on any given day.[32] Five years earlier, the Schriro Report raised concerns about the use of segregation "to detain special populations whose unique medical, mental health, and protective custody requirements cannot be accommodated in general population housing."[33] Segregation is also overused for disciplinary purposes. A recent examination of solitary confinement of immigrant detainees in the Essex County Correctional Facility found that the facility overused solitary confinement by, among other things, "stacking" disciplinary charges against detainees (charging a detainee with multiple offenses for a single incident) and imposing solitary confinement during prehearing detention before any finding of misconduct.[34]

It is well established that this type of isolation exacerbates physical and mental health problems.[35]

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[32] Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. Times, Mar. 24, 2013, at A1.

[33] See Schriro, *supra* note 17, at 21; Nat'l Immigrant Justice Ctr. & Physicians for Human Rights, *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Det.* 4 (2012) (documenting similar findings on a national scale).

[34] N.J. Advocates for Immigrant Detainees, *Isolated In Essex: Punishing Immigrants Through Solitary Confinement* 23-24 (June 2016).

[35] Juan E. Mendez (Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment of Punishment), *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/68/295 (Aug. 9, 2013); Craig Haney, *Mental Health Issues in Long-Term Solitary and*

Research demonstrates that solitary confinement can lead to a combination of symptoms referred to as "prison psychosis," including hypersensitivity to external stimuli, hallucinations, panic attacks, obsessive thoughts, paranoia, and lack of impulse control.[36] Suicide and self-harm are also more common in solitary confinement than in general prison populations.[37]

In 2013, ICE acknowledged the problem, establishing procedures for reviewing detainees placed in segregation and outlining stricter requirements for disciplinary segregation.[38] The revised standards provide that disciplinary segregation may be imposed only after a hearing and a determination of a "serious violation" of a facility rule. The revised standards suffer from compliance problems, howev-

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"Supermax" Confinement, 49 Crime & Delinquency 124, 124-56 (2003).

[36] See Nat'l Immigrant Justice Ctr. & Physicians for Human Rights, *Invisible in Isolation*, *supra* note 33, at 12.

[37] Vera Inst. of Justice, *Solitary Confinement: Common Misconceptions and Emerging Safe Alts.*, 17-18 (May 2015) (reporting that 69% of suicides among incarcerated individuals in California in 2006 took place in segregated housing); *see also* "*The Strange Death of Jose de Jesus*," National Public Radio Latino USA (July 15, 2006), http://tinyurl.com/zdqv8wr (chronicling suicide of detainee in isolation who was taken off suicide watch 24 hours after prior suicide attempt); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.").

[38] U.S. Immigration & Customs Enf't, 11065.1, Review of the Use of Segregation for ICE Detainees (2013).

er, including that individual facilities operate under contracts that do not necessarily require implementation of the updated procedures.[39]

B. Psychological Harms of Long-Term Detention.

Immigrants in detention for prolonged periods suffer severe and lasting psychological harms. The very fact that the detention is prolonged takes a serious toll on the mental health of detainees. All detainees face uncertainty about when or whether they will be released, which frequently leads to high rates of anxiety, despair, and depression.[40] During prolonged detention, these feelings become more pronounced and often manifest themselves as diagnosable mental health conditions.[41] One study concluded that detention without a definite endpoint—the characteristic of all prolonged detention for immigrant detainees—results in "physical, social and emotional problems [that] continue to plague individuals long after their release . . . ."[42]

The mental toll of detention is exacerbated in facilities that have physical infrastructures and program offerings generally designed for inmates who

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[39] John Marshall Law School, *U.S. Immigration and Customs Enf'ts New Directive on Segregation: Why We Need Further Protections* 7 (2014).

[40] *See* Physicians for Human Rights, *Punishment Before Justice: Indefinite Det. in the US* 11 (2011).

[41] *Id.* at 16.

[42] *Id.* at 17.

are expected to remain in custody for a year or less.[43] Many detainees have described being detained for prolonged periods under these conditions as difficult to bear.[44]

Nor are detention facilities equipped to provide quality mental health care to long-term detainees. A 2011 DHS Inspector General report found that the ICE Health Service Corps, which provides direct care and arranges for outside health care services to detainees, staffed "only 18 of the nearly 250 detention centers nationwide and has limited oversight and monitoring for mental health cases across immigration detention centers."[45] This government report raised serious concerns about ICE's capacity to provide detainees with proper treatment.[46] The high

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[43] Physicians for Human Rights & Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Det. for Asylum Seekers* 10-14, 126 (2003) (immigrant detainees "reported feeling degraded and being treated like criminals" and described the negative impact this treatment had on their mental health).

[44] *Id.*; *see also* Women's Refugee Comm'n, *Politicized Neglect: A Report from Etowah County Det. Ctr.* 5 (2012).

[45] Office of Inspector Gen., U.S. Dep't of Homeland Sec., *Mgmt. of Mental Health Cases in Immigration Det.* 1 (2011).

[46] *Id.* at 1. This concern is even greater for detainees with pre-existing mentally illnesses who often either go untreated or receive "one size fits all" medication. *See id.* at 5 (noting that the Health Service Corps lacks a mechanism for screening and tracking mental health conditions of individual detainees).

rate of suicides among detainees underscores the urgent nature of these concerns.[47]

While all long-term detainees face the prospect of lasting psychological harm,[48] asylum-seekers and other survivors of recent violence and trauma confront particularly severe mental health challenges. Asylum seekers are often in an especially vulnerable and fragile mental state, as many arrive having escaped rape, torture, or other forms of trauma, and having left their homes and families behind.[49] One recent report estimated that in less than three years, from October 2010 to February 2013, the United States detained approximately 6,000 torture survi-

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[47] *See* Alex Friedmann, *32 Deaths at CCA-operated Immigration Det. Facilities Include at Least 7 Suicides*, Prison Legal News (June 20, 2015), http://tinyurl.com/jfb8bde.

[48] *See, e.g.*, Golash-Boza, *supra* note 19, at 65 (recounting how substandard medical care during prolonged detention resulted in an immigrant suffering serious health problems); Heeren, *supra* note 19, at 601-03, 622 (same).

[49] One study found that 74% of detained asylum seekers had been tortured before arriving to the U.S., 67% had been imprisoned in their country of origin, 59% reported a murder of a family member or friend, and 26% reported having been sexually assaulted prior to arrival. Allen Keller et al., *Mental Health of Detained Asylum Seekers*, 362 Lancet 1721, 1722 (2003); *see also* Ctr. for Victims of Torture et al., *Tortured & Detained: Survivor Stories of U.S. Immigration Det.* 5 (2013) [hereinafter *Tortured & Detained*]; *see also* Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 Law & Ethics Hum. Rts. 109, 139 (2013) (documenting 34 women with domestic violence-based asylum claims held in Eloy Detention Center in 2010-2011 for 6-22 months).

vors who were seeking asylum.[50] The mental health issues associated with this population are striking. A study of detained asylum-seekers found that 77% showed clinically significant symptoms of anxiety, 86% exhibited symptoms of depression, and 50% suffered from symptoms of Post-Traumatic Stress Disorder ("PTSD").[51] Of these detainees, 26% reported thoughts of suicide while in detention, and just under 3% reported attempting suicide.[52] In turn, PTSD symptoms render such individuals more susceptible to sexual victimization and less likely to report it.[53] Asylum-seekers are thus both more susceptible to the harms of prolonged detention and more likely to be scarred by them.

C. Economic Harms of Prolonged Detention.

As this Court has observed, "[t]he time spent in jail awaiting trial . . . often means loss of a job; it disrupts family life; and it enforces idleness . . . . The time spent in jail is simply dead time . . . ." *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). The "dead time" of long-term detention affects lawful permanent residents alo[illegible] with other immigrants legally eligible to

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[50] *Tortured & Detained*, *supra* note 49, at 5.

[51] Keller et al., *supra* note 49, at 1722.

[52] *Id.* Conversely, detainees who exhibited symptoms of anxiety, depression, and PTSD while detained showed significant improvement after release from detention. *Id.*; *see also Tortured & Detained*, *supra* note 49, at 12.

[53] *See* Nat'l Prison Rape Elimination Comm'n, *supra* note 24, at 178 (citations omitted).

work in the United States.[54] The economic hardship imposed from being unable to work for long periods of time is clear,[55] and is especially pronounced for immigrants, who often are in a precarious financial state even before detention.[56] Immigrants in extended detention almost invariably lose their jobs, and thus income for necessities, including food and shelter for their families. Some also lose their homes through foreclosure.[57] For the few detainees fortunate enough to be able to hire a lawyer, the concurrent inability to work and the assumption of legal expenses compounds the economic harm.[58]

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[54] *See* Constitution Project, *Recommendations for Reforming our Immigration Det. Sys. and Promoting Access to Counsel in Immigration Proceedings* 22 (2009) (noting that lawful permanent residents involved in removal proceedings "may have held long term-jobs in this country"); *see also* U.S. Citizenship & Immigration Servs., *Instructions for I-765, Application for Employment Authorization* 1-6 (2012) (listing classes of aliens temporarily in the United States able to apply for work, including asylees/refugees, certain nationality categories, and others).

[55] *See* Ajay Chaudry et al., The Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enf't* 27 (2010) (noting families "generally lose[] a breadwinner" during immigration detention); Human Rights Watch, *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status* 36 (2009) (noting that the detention of refugees "results in loss of jobs").

[56] *See* Randy Capps et al., The Urban Inst., *A Profile of the Low-Wage Immigrant Workforce* 5-6 (2003).

[57] *See* Heeren, *supra* note 19, at 622 (immigrant lost his home as a result of three-year long detention); *see also* Chaudry et al., *supra* note 55, at ix, 29-31.

[58] *See Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984) (noting that the "hardship from

And, an individual's ability to work is hindered not only during detention, but also after release because of the stigma associated with detention. Employers may avoid hiring formerly detained immigrants because they are afraid of administrative complications with ICE.[59]

D. Legal Harms of Prolonged Detention.

Prolonged detention inflicts substantial harm on an individual's access to and exercise of legal rights, including hindrance of the "ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker*, 407 U.S. at 533. The vast majority of detainees—86% nationally—lack counsel in immigration proceedings.[60] Long-term detainees are at a distinct disadvantage as many are held in remote locations far from legal services and have limited ability to seek or pay for representation.[61]

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being unable to work . . . to pay for legal representation is beyond question").

[59] *See* Chaudry et al., *supra* note 55, at 28.

[60] *See* Eagly, *supra* note 4; *see also* Separate Representation for Custody and Bond Proceedings, 79 Fed. Reg. 55659, 55659-60 (proposed Sept. 17, 2014) (to be codified at 8 C.F.R. pt. 1003) ("Of the 265,708 initial case completions for detained aliens from FY 2011 to FY 2013, 210,633 aliens, or 79 percent, were unrepresented.").

[61] *See Jails and Jumpsuits*, *supra* note 19, at 31 (almost 40% of ICE detention bed space is located more than 60 miles from an urban center); Peter L. Markowitz et al., Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability And Adequacy of Counsel In Removal Proceedings*, 33 Cardozo L. Rev. 357, 369 (2011)

Having a lawyer is critical. A recent study documented the dramatic difference a lawyer makes: detained immigrants with counsel obtained a successful outcome[62] in 21% of cases, ten-and-a-half times greater than the 2% rate for their *pro se* counterparts.[63] A nationwide study focused specifically on asylum adjudication concluded that whether an

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(study of detainees in New York concluded that representation rates for detainees transferred out of state were "dismal"); Am. Bar Ass'n, Comm'n on Immigration, *Reforming the Immigration Sys.: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-9 (2010) [hereinafter *Reforming the Immigration System*] (stating that "remote facilities . . . and the practice of transferring detainees from one facility to another often more remote location without notice stand in the way of retaining counsel for many detainees").

[62] A successful outcome refers to the ability to remain in the country, either because the government's charges are terminated (*e.g.*, when the Notice of Action fails to state a valid reason for removal) or because an immigration judge grants relief from removal (*e.g.*, asylum).

[63] Eagly, *supra* note 4, at 50 fig. 14; *see also* Markowitz et al., *Accessing Justice*, *supra* note 61, at 363 (from 2005 to 2011 non-detained immigrants with lawyers had successful outcomes 74% of the time, while detained immigrants without counsel prevailed 3% of the time); Am. Bar Ass'n, Comm'n on Immigration, *Reforming the Immigration Sys.: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-8 (2010) [hereinafter *Reforming the Immigration Sys.*] ("[T]he disparity in outcomes of immigration proceedings depending on whether noncitizens are unrepresented or represented is striking.").

asylum seeker is represented is the single most important factor affecting the outcome of her case.[64]

Irrespective of whether a detainee has legal counsel, the circumstances of long-term detention render effective representation difficult, if not impossible. One major obstacle is the limited access to telephones in most detention facilities.[65] Assuming a detainee is able to locate counsel, the detainee must pay to make phone calls, a cost that many long-term detainees find prohibitive.[66] A broad national survey of detention facilities found that many facilities prohibited private calls between lawyers and their detained clients, and in several cases, even leaving messages was impossible.[67] Mail communication is

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[64] Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007) ("Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."); *see also Reforming the Immigration Sys.*, *supra* note 61, at 5-8.

[65] *See* Nat'l Immigrant Justice Ctr., *Isolated in Det.: Limited Access to Legal Counsel in Immigration Det. Facilities Jeopardizes a Fair Day in Court* 4 (2010) [hereinafter *Isolated in Detention*] (reporting widespread problems with phone access); *see also* U.S. Gov't Accountability Office, *GAO-07-875, Alien Det. Standards: Telephone Access Problems Were Pervasive at Det. Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance* 15-17 (2007) (discussing deficiencies with phone system).

[66] *See, e.g.*, Ruben Loyo & Carolyn Corrado, N.Y.U. Sch. of Law Immigrant Rights Clinic, *Locked Up But Not Forgotten: Opening Access to Family & Cmty in the Immigration Det. Sys.* 23 (2010).

[67] *Isolated in Detention*, *supra* note 65, at 9.

also slow and costly and an unreliable means of communication for long-term detainees, who are frequently transferred from one facility to another. Between 1998 and 2010, 52% of detainees were transferred at least once, and 46% were moved multiple times.[68] With no reliable mail forwarding, mail intended for detainees is often returned or lost. Furthermore, despite standards requiring access to legal resources, detention facilities often provide inadequate resources, including limited materials in languages other than English.[69]

When detainees struggle to obtain the assistance necessary to mount an effective defense, the result is an overall increase in the total time spent in detention. A study of detainees from 2007 through 2012 showed that, among detainees who sought counsel, nearly 51% of all court adjudication time was incurred due to requests for time to find an attorney.[70]

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[68] *See* Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* 1, 17 (2011).

[69] *See* Schriro, *supra* note 17, at 23; Org. of Am. States, Inter-American Comm'n. on Human Rights, *Report on Immigration in the United States: Det. and Due Process* 117 (2010); Nina Rabin, *Unseen Prisoners: Women in Immigration Det. Facilities in Arizona*, 23 Geo. Immigr. L.J. 695, 728 (2009) (finding multiple Arizona detention facilities fail to comply with detention standards providing for access to legal resources like law libraries).

[70] Eagly, *supra* note 4, at 61 fig. 16.

III. Prolonged Detention Harms the Families of Detainees, Including U.S.-Citizen Children.

Prolonged detention adversely affects detainees' families, especially children, many of whom are U.S. citizens.[71] Excluding arriving asylum seekers, more than 60% of class members in this case have at least one U.S.-citizen child. J.A. 554-56 ¶¶ 15-20. Immigrant detainees have minimal contact with their families. Between 1998 and 2010, detained immigrants were transported an average of 370 miles to a detention facility, making regular contact with their children and families virtually impossible.[72] A recent study of visitation in the context of immigration detention found those detained in privately-contracted facilities were even less likely to have visits, suggesting that both restrictive visitation policies and geography undermine detainee access to family visits.[73]

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[71] A joint report by the Migration Policy Institute and Urban Institute recently estimated that parents of U.S. citizen children made up between one-fifth and one-quarter of the 3.7 million immigrants deported between 2003 and 2013. *Health and Social Serv. Needs of U.S.-Citizen Children with Detained or Deported Immigrant Parents* (Sept. 2015) http://tinyurl.com/hxz7; *see also* Seth F. Wessler, *Nearly 250K Deportations of Parents of U.S. Citizens in Just over Two Years*, Colorlines (Dec. 17, 2012, 9:45 AM), http://tinyurl.com/gnv7vye.

[72] Seth Freed Wessler, Applied Research Ctr., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 5 (2011); *see also* Loyo & Corrado, *supra* note 66, at 1, 9.

[73] Caitlin Patler & Nicholas Branic, *Legal Status and Patterns of Family Visitation During Immigration Det.*, 3 Russell Sage Journal of the Social Sciences (forthcoming 2017). *See also*

Children suffer the most acute effects. Increased anxiety, stress, and depression have been documented in children with one or both parents detained.[74] An Urban Institute study found that children whose parents were held in immigration detention for long periods were more likely to exhibit adverse changes in sleeping habits and behavior, including increased anger and withdrawal, as compared with children who were reunited with their parents within a month of apprehension.[75] The harmful effects extend to children's well-being in other areas, including development and academic performance.[76]

Schriro, *supra* note 17, at 23-24; Loyo & Corrado, *supra* note 66, at 12 fig.1; *Jails and Jumpsuits*, *supra* note 19, at 9.

[74] Marjorie S. Zatz & Nancy Rodriguez, *Dreams and Nightmares: Immigration Policy, Youth, and Families* 86 (2015) (summarizing this research); *see also* Health and Social Service Needs of U.S. Citizen Children with Detained or Deported Immigrant Parents (children with detained or deported parents "refused to eat, pulled out their hair, or had persistent stomachaches or headaches. Others turned to more self-destructive outlets such as cutting themselves or abusing substances.").

[75] Chaudry et al., *supra* note 55, at 43. Ten parents in the population tracked by the Urban Institute study were detained up to one month and 18 parents were detained longer than one month. *Id.* at 14.

[76] Kalina Brabeck & Qingwen Xu, *The Impact of Det. and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 Hisp. J. of Behav. Sci. 341 (2010). Studies in the context of children of incarcerated parents confirm the negative impacts of parental detention. Todd R. Clear, *Imprisoning Cmtys: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* 97 (2007) (citing John Hagan et al., *Collateral Consequences of Imprisonment for Children, Communities and Prisoners, in Prisons* 121-162 (Michael Tonry & Joan Petersilia, eds. 1999).

Recent research indicates that immigration detention is often one of multiple factors that combine to make children of undocumented immigrants more prone to behavioral and emotional problems throughout their lives.[77]

For some parents, prolonged detention has resulted in their children being removed from the family entirely and placed in foster care. In 2011, a national research study estimated that at least 5,100 children whose parents had been either detained or deported were living in foster care.[78] In these cases, in addition to being separated from their children, detained parents struggle to meet court mandates set by the child welfare system, including visits and parenting classes.[79] Due to state and federal timelines established to ensure a permanent home for children in government custody, detained parents may lose their parental rights as a result of prolonged detention.[80]

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[77] Kalina Brabeck et al., *The Psychosocial Impact of Det. and Deportation on U.S. Migrant Children and Families*, 84 Am. J. of Orthopsychiatry 495, 498-99 (2013) (summarizing this research); Human Impact Partners, *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families* (2013).

[78] Wessler, Applied Research Ctr., *supra* note 72, at 4.

[79] Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare Sys.*, 44 Conn. L. Rev. 99, 140 (2011).

[80] *Id.*; *see also* Wessler, Applied Research Ctr., *supra* note 72, at 8; Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice Sys. and the Unjust Severance of the Parent-Child Relationship*, 47 Family L.Q. 141, 141-72 (2013); Wom-

In 2013, ICE recognized this concern and issued a Parental Rights Interests Directive, establishing procedures for parents in detention with child welfare cases.[81] Until the number of parents subject to prolonged detention drops significantly, however, the directive cannot fully address the scope of challenges facing these families. A recent U.S. Department of Health and Human Services directive notes that child welfare agencies continue to regularly encounter the prolonged detention of parents with children in the child welfare system.[82]

IV. Prolonged Detention Harms Society.

The costs of prolonged detention are staggering. Between FY 1995 and FY 2016, the average daily immigration detention population grew from 7,475 to 32,985.[83] A total of 367,774 individuals were in ICE

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en's Refugee Comm'n, *Torn Apart by Immigration Enf't: Parental Rights and Immigration Det. 10* (2010); Wendy Cervantes & Yali Lincroft, *The Impact of Immigration Enf't on Child Welfare* 6 (2010).

[81] U.S. Immigration & Customs Enf't, *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities Directive* (Aug. 23, 2013), http://tinyurl.com/j2p755s

[82] Admin. On Children, Youth & Families, U.S. Dep't of Health & Human Servs., ACYF-CB-IM-15-02, *Case Planning and Service Delivery for Families with Parents and Legal Guardians who are Detained or Deported by Immigration Enf't* (Feb. 20, 2015); *see also* Victoria Kline, Instituto para las Mujeres en la Migración, *Where Do We Go From Here? Challenges Facing Transnational Migrant Families Between the US and Mexico* 31-32 (2013).

[83] ACLU, *Shutting Down the Profiteers: Why and How the Dep't of Homeland Sec. Should Stop Using Private Prisons* 7 (Sept. 2016).

custody at some point during FY 2015.[84] To accommodate this extraordinary volume of detainees, DHS requested $2.407 billion in its FY 2016 budget proposal to fund immigrant detention.[85] This amounts to more than $6.5 million per day to detain immigrants, at an estimated daily cost of $158 per detainee.[86]

Conversely, alternatives to detention, identified by the District Court in this case, cost anywhere from 17 cents to 17 dollars a day per individual.[87] The government estimates that, in 2013, the average cost per participant in alternatives to detention was $10.55.[88]

Detaining productive, contributing members of society also imposes opportunity costs. Immigrants, both documented and undocumented, pay property

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[84] TRAC Immigration, *New Data on 637 Det. Facilities Used by ICE in FY2015* (Apr. 12, 2016), http://tinyurl.com/hdjzlgj.

[85] U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2016* 13 (2014); Nat'l Immigration Forum, The President's FY 2016 Budget Dep't of Homeland Sec. (Feb. 6, 2015), http://tinyurl.com/h4lmo3w.

[86] U.S. Gov't Accountability Office, *GAO-15-26, Alts. to Det.: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 9-12, 19 (Nov. 2014).

[87] U.S. Dep't of Homeland Sec., *Congressional Budget Justification: FY 2012, U.S. Immigration and Customs Enf't Salaries and Expenses: Alts. to Det.* 43-45 (2012); *see also* Nat'l Immigration Forum, *The Math of Immigration Det.: Runaway Costs for Immigration Det. Do Not Add Up to Sensible Policies* 11 (2013).

[88] GAO, *Alternatives to Detention*, *supra* note 86.

and sales taxes, and many pay income taxes.[89] A 2010 Institute for Taxation and Economic Policy study found that households headed by unauthorized immigrants contributed approximately $11.2 billion in taxes to state and local governments.[90] This study did not address the separate contributions of immigrants authorized to be in the country. Prolonged detention compromises these substantial revenues.[91]

V. Bond Hearings Do Not Undermine Immigration Enforcement.

Social science research establishes that, for the relatively small number of detainees subject to prolonged detention, the provision of individualized bond hearings does not lead to increased rates of absconding or recidivism. Furthermore, the data available today differs significantly from when the Court considered questions regarding flight risk and recidivism of immigrant detainees in *Demore*.

A. Detainees Released on Bond After an Individualized Bond Hearing Have High Rates of Appearance in Future Court Proceedings.

A recent analysis of EOIR court records over the past 20 years showed an increasing number of de-

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[89] *See* Golash-Boza, *supra* note 19, at 148; Immigration Policy Ctr., *Unauthorized Immigrants Pay Taxes, Too* 1 (2011) [hereinafter *Immigrants Pay Taxes*].

[90] *Immigrants Pay Taxes*, supra note 89, at 3 (considering personal income taxes, property taxes, and sales taxes).

[91] *Id.*

tainees receiving bond hearings, and yet no corresponding increase in absconder rates.[92] Furthermore, analysis of the case outcomes of individuals released on bond by an Immigration Judge showed the overwhelming majority return to court for their removal proceedings.[93] For example, in FY 2015, 86% of individuals released from detention by an Immigration Judge showed up for their hearing.[94]

Given that non-detained removal proceedings take years to resolve, there is not yet a sufficiently robust number of class members released pursuant to bond hearings in this case to analyze rates of absconding. If anything, the evidence suggests that the appearance rates among class members will be even higher than 86%. Immigration Judges who grant releases at bond hearings held pursuant to the Ninth Circuit's decision below are required to consider imposing conditions of supervision.[95] The government's conditional supervision program, called ISAP II (Intensive Supervision Appearance Program), relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to super-

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[92] TRAC Immigration, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?* (Sept. 14, 2016), http://tinyurl.com/jjbyv64.

[93] *Id.*

[94] *Id.* In addition, the appearance rate of those released by an Immigration Judge is substantially higher than the appearance rate of individuals that ICE itself released from custody: 86% as compared to 76.6%. *Id.*

[95] *Rodriguez*, 804 F.3d at 1087-88.

vise participants.[96] A government-contracted evaluation of this program reported a 99% attendance rate at all EOIR hearings and a 94% attendance rate at final hearings.[97]

Additionally, methodological concerns must be taken into account when considering the government's statistics regarding *in absentia* orders. The government reports that 41% of case completions in FY 2015 were *in absentia* orders "after the alien absconded." Pet. Br. at 22. This statistic is problematic.[98] *In absentia* orders are typically entered after a single failure to appear, while other removal cases are often continued for months or years without disposition. When the volume of removal cases spikes—as it did in 2014—the short-term case completion data following the spike inevitably over-represents the quickly entered *in absentia* orders, while the remainder of removal cases are still pending.

The sole fact of an *in absentia* order also does not, as the government assumes, mean that the alien has permanently absconded. To the contrary, *in absentia* orders are issued after only a single failure to

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[96] U.S. Gov't Accountability Office, *GAO-15-26, Report to Congressional Committees: Alternatives to Detention* 10-11 (Nov. 2014).

[97] *Intensive Supervision Appearance Program II: Contract Year 2013 Annual Report* (BI Incorp. 2013); *see also* J.A. 380; J.A. 564-65 at 112:2-24; J.A. 432-33; *see also* App. 53a-55a.

[98] *See* TRAC Immigration, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?*, *supra* note 92, at n.7 (explaining inaccuracies in EOIR's methodology for calculation of the *in absentia* rate).

appear. In some cases, an initial failure to appear arises from a lack of notice of the hearing or ineffective assistance of counsel. Those cases may be subsequently reopened with the alien present, but the *in absentia* order is still counted in the government's statistic.[99]

Finally, the government statistic omits from the equation the substantial number of cases completed through means other than a final hearing, such as prosecutorial discretion or administrative closure. These other methods of case completion currently make up approximately 25% of completions. Factoring in these alternative dispositions, the *in absentia* orders would represent a much smaller percentage of the total annual completions.[100]

B. Detainees Released on Bond Are No More Likely to Engage in Criminal Activities Than the General Population.

Substantial research establishes that immigrant crime rates have long been no greater—and in some instances substantially lower—than the crime rate for citizens.[101] This is consistent with the general

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[99] *Id.*

[100] *Id.*

[101] Walter A. Ewing et al., Am. Immigration Council, *The Criminalization of Immigration in the United States* 2 (July 13, 2015), http://tinyurl.com/jxcv9aq (reviewing data and concluding that "immigrants are less likely to be criminals than the native-born"); Alex Nowrasteh, Cato Institute, *Immigration and Crime—What the Research Says* (July 14, 2015, 11:49 AM), http://tinyurl.com/nmpejag ("With few exceptions, immigrants

observation that, while immigrant populations have steadily grown over the last several years, crime rates in the United States have trended downward.[102] And at least as of May 2014, ICE reported a recidivism rate of less than 3% for the 36,007 individuals with criminal records who were released from ICE custody in FY2013.[103]

The sole empirical basis for the government's assertion that bond hearings will lead to increased recidivism is a newspaper article that analyzed 323 noncitizens released pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001). Pet. Br. at 34. But those individuals were not screened before release to determine if they posed a danger or a flight risk.[104] This dataset therefore is not probative of recidivism rates for immigrants who obtain release through an individualized bond hearing.[105]

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are less crime prone than natives or have no effect on crime rates").

[102] Ewing et al., *supra* note 101, at 1.

[103] Office of the Exec. Assoc.. Dir. of Enf't & Removal Operations, U.S. Immigration & Customs Enf't, *Criminal Recidivist Report* 3 (2013).

[104] The referenced individuals were released by ICE pursuant to the Court's decision in *Zadvydas v. Davis* because they had been ordered removed, yet their removal could not be effectuated in the reasonably foreseeable future.

[105] Mark Fleming, National Immigrant Justice Center, *Solicitor General Again Relying on Faulty Data to Justify Indefinite Immigration Det. in* Jennings v. Rodriguez (Oct. 14, 2016), http://tinyurl.com/hj7h2ch.

The recidivism figure in the article also does not distinguish between routine traffic offenses or probation violations and serious crimes.[106] This omission is particularly misleading in light of the fact that the majority of detainees subject to mandatory detention based on prior crimes are not considered to pose high public safety risks. A recent study of ICE's own risk assessments (based on a computerized algorithm that ICE uses in its book-in process to assess public safety and flight risk) showed that ICE classified only 25% of a group of 101 detainees subject to mandatory detention as posing a high risk to public safety.[107] This was roughly the same as the percentage of high risk classifications for detainees subject to non-mandatory detention.[108] Presumably, if these "high risk" detainees were detained for more than six months and received bond hearings, they would be unlikely to secure release in light of the factors that led to their high risk classification.

Finally, as data from the government's supervision programs also demonstrate, alternatives to detention are effective in preventing criminal activity by immigrants released on bond. For instance, in 2011, less than 1% of participants in ISAP were re-

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[106] *Id.*

[107] Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Det.*, Laws 2016, 9 (July 5, 2016). Specifically, for those subject to mandatory detention, ICE classified 25% (25 of 101) high risk, 58% (59 of 101) medium risk, and 17% (17 of 101) low risk. For those subject to non-mandatory detention, ICE classified 23% as high public safety risks (59 of 258 cases), and 39% as medium public safety risks (101 of 258 cases).

[108] *Id.*

moved from the program due to arrest by another law enforcement agency. J.A. 449. By employing alternatives to detention, ICE can substantially mitigate recidivism without needlessly prolonging detention.

CONCLUSION

This Court should affirm the Ninth Circuit's decision.

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